

OPINION NO. 79-040**Syllabus:**

1. In accordance with R.C. 2967.13 the Ohio Adult Parole Authority, through the Parole Board, must consider for parole those individuals who have been transferred to the custody of the Department of Mental Health and Mental Retardation from state penal institutions or reformatories pursuant to the provisions of R.C. 5125.05.
2. The Department of Rehabilitation and Correction has the authority to effect the return transfer of a prisoner, transferred pursuant to R.C. 5125.05 to a mental health facility, for the limited purpose of holding the required parole hearing by the Adult Parole Authority.
3. The granting of a parole to a prisoner confined in a mental institution pursuant to R.C. 5125.05 does not discharge the prisoner from the physical custody of the mental institution. A prisoner who has been paroled may be discharged from the mental institution only upon the occurrence of one of the conditions for discharge enumerated in R.C. 5125.05.

**To: George F. Denton, Director, Dept. of Rehabilitation and Correction,
Columbus, Ohio**

By: William J. Brown, Attorney General, July 27, 1979

I have before me your request for my opinion which reads, in part, as follows:

May the Ohio Adult Parole Authority, through the Parole Board, hear and consider for parole release, and ultimately release, individuals who have been transferred to the custody and care of the Department of Mental Health and Mental Retardation from State Reformatories or Penal Institutions pursuant to Section 5125.05 Ohio Revised Code?

Although it is well established in Ohio law that parole is a matter of grace, Rose v. Haskins, 21 Ohio St. 2d 94 (1970), the statutes pertaining to parole eligibility create a statutory right to a consideration for parole. State v. Packer, 16 Ohio App. 2d 171 (Ct. App. Marion Co., 1969).

R.C. 2967.13 and 2967.19 set forth the requirements for parole eligibility.

R.C. 2967.13 provides as follows:

(A) A prisoner serving a sentence of imprisonment for felony becomes eligible for parole at the expiration of his minimum term, diminished as provided in section 2967.19 of the Revised Code.

(B) A prisoner serving a sentence of imprisonment for life for a capital offense becomes eligible for parole after serving a term of fifteen full years.

(C) A prisoner serving a sentence of imprisonment for life for a noncapital offense, imposed under any former law of this state, or serving a minimum term or terms, whether consecutive or otherwise, of imprisonment longer than fifteen years, imposed under any former law of this state, becomes eligible for parole after serving a term of ten full years' imprisonment.

Your initial question necessitates an inquiry as to whether a prisoner "serves" a portion of his term for purposes of R.C. 2967.13 when he is committed to a mental health facility pursuant to R.C. 5125.05. In short, does time served in a mental institution count towards parole eligibility?

R.C. 5125.05, as recently amended by Am. Sub. H.B. No. 565 (eff. 11-01-78), sets forth the terms and conditions whereby a prisoner in need of psychiatric treatment may be transferred from the control of the Department of Rehabilitation and Correction to the custody of the Department of Mental Health and Mental Retardation. There is clear evidence in R.C. 5125.05 that the General Assembly equated time served in a mental health facility with time served in a prison for purposes of parole eligibility. Of particular significance is that portion of R.C. 5125.05 which provides that "[a] prisoner shall be credited with all statutory reductions in sentence while in a facility of the department of mental health and mental retardation under the same terms and conditions as if he were in an institution of the department of rehabilitation and correction." It would be highly anomalous to provide for advanced parole consideration based upon a prisoner's tenure in a mental health facility while denying him consideration for parole on the basis of such custodial residence.

Moreover, R.C. 5125.05 requires the prison warden who transfers the prisoner to inform the Department of Mental Health and Mental Retardation of the date on which the prisoner's sentence will expire and establishes expiration of sentence as one of three events which may trigger discharge from the mental facility. Quite clearly, a prisoner's sentence could not expire while he is in the mental facility unless his time spent in such a facility counts towards the various statutory time frames relating to the duration of his confinement.

Finally, R.C. 5125.05 provides that a prisoner discharged from the mental facility on the grounds that he ceases to be a mentally ill person is to be returned to prison "unless an authority empowered to release the prisoner from custody under the criminal sentence has notified the department that the prisoner has been paroled . . ." Clearer recognition of an opportunity for parole while confined in the mental facility would be difficult to imagine.

Since consideration for parole is a statutory right, I must conclude that the Department of Rehabilitation and Correction, through the Parole Board of the Adult Parole Authority, must hear and consider a prisoner for parole when such a prisoner becomes statutorily eligible for consideration for parole, albeit the prisoner is then committed to a facility operated by the Department of Mental Health and Mental Retardation.

It is my understanding that you are also concerned with the practical matter of transferring the prisoner back to the penal institution for the parole hearing. It is clear from R.C. 5125.05 that, except for discharge under one of the three conditions set forth therein, no prisoner admitted to a Department of Mental Health and Mental Retardation facility is permitted to leave the custody of the facility without the approval of the Director of Rehabilitation and Correction.

This provision, however, provides implicit authority for the Department of Rehabilitation and Correction to effect the return of a prisoner for the purpose of a parole hearing by the Adult Parole Authority because any such transfer would necessarily be with the "approval" of the latter director.

Because I have concluded that it is mandatory for the Adult Parole Authority to consider for parole those prisoners transferred to the custody of the Department of Mental Health and Mental Retardation pursuant to R.C. 5125.05, the issue then arises as to the effect of a grant of parole upon the custody exercised over the parolee-patient by the Department of Mental Health and Mental Retardation. Your specific question is whether a parole under these circumstances results in the ultimate release of the prisoner from the mental institution.

Any such inquiry must begin with an analysis of the three statutory standards for discharge expressly set forth in R.C. 5125.05:

A prisoner admitted to a facility of the department of mental health and mental retardation shall be discharged when any of the following occur:

(A) He ceases to be a mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order;

(B) The head of the facility to which he was admitted determines the hospitalization to be no longer advisable;

(C) His sentence expires or is otherwise suspended or terminated by proper legal authority.

Quite clearly, a grant of parole does not qualify as a determination that the prisoner has ceased to be mentally ill or retarded, nor is it a determination that hospitalization is no longer advisable. Hence, parole does not satisfy either of the initial tests regarding discharge. It is equally clear that parole is not an expiration or termination of sentence. R.C. 2967.01(E) defines parole as a release from confinement subject to supervision during the remainder of the inmate's sentence. Does parole constitute a "suspension" of sentence for purposes of the third discharge test? I conclude that it does not. Parole is a suspension of confinement in a facility operated by the Department of Rehabilitation and Correction, not a suspension of the prisoner's sentence. State ex rel. McKee v. Cooper, 40 Ohio St. 2d 65 (1974). Unlike a release on shock probation pursuant to R.C. 2947.061 (an example of suspension of sentence) time served on parole is counted towards completion of sentence.

I therefore conclude that the grant of parole does not effect the release or discharge of a prisoner committed to a mental health facility operated by the Department of Mental Health and Mental Retardation. Before a committed prisoner may be discharged, he must meet one of the three tests enumerated in R.C. 5125.05 as a condition precedent to discharge.¹

¹ R.C. 2967.01(E) authorizes the Adult Parole Authority to grant parole subject to terms prescribed in published rules and official minutes. See Rose v. Haskins, supra. Hence, the Adult Parole Authority may simply grant parole or, in the alternative, expressly condition the effective date of parole upon the prisoner's attainment of any one of the three discharge conditions enumerated in R.C. 5125.05. In either event, the granting of parole does not, in and of itself, constitute any warrant for release of the parolee from the physical custody of the Department of Mental Health and Mental Retardation absent compliance with the conditions for discharge enumerated in R.C. 5125.05.

In specific answer to your question, it is my opinion, and you are advised, that:

1. In accordance with R.C. 2967.13 the Ohio Adult Parole Authority, through the Parole Board, must consider for parole those individuals who have been transferred to the custody of the Department of Mental Health and Mental Retardation from state penal institutions or reformatories pursuant to the provisions of R.C. 5125.05.
2. The Department of Rehabilitation and Correction has the authority to effect the return transfer of a prisoner, transferred pursuant to R.C. 5125.05 to a mental health facility, for the limited purpose of holding the required parole hearing by the Adult Parole Authority.
3. The granting of a parole to a prisoner confined in a mental institution pursuant to R.C. 5125.05 does not discharge the prisoner from the physical custody of the mental institution. A prisoner who has been paroled may be discharged from the mental institution only upon the occurrence of one of the conditions for discharge enumerated in R.C. 5125.05.